

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appl. No. : 10/511,694
Applicant : Mussawir-Key, Frederick Wade
Filed : April 28, 2005
Title: : CHEESE SUBSTITUTES
TC/A.U. : 1794
Examiner : Wong, Leslie A.
Docket No. : MORE-37106

PRE-APPEAL BRIEF REQUEST FOR REVIEW

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Commissioner for Patents
P.O. Box 1450
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Sir/Madam:

A pre-appeal brief conference is respectfully requested in the present application.

Claim Rejections under 35 U.S.C. §102(b), and alternatively 103(a)

Claims 1-5, 7, 9, 10, 12-19, 21-24, 26, 28, 29 and 31-35 (claims 1 and 17 being independent) have been rejected under 35 U.S.C. §102(b) as anticipated by, or in the alternative under 35 U.S.C. §103(a) as obvious over, Blackstock, US 3,689,290.

Claim 1 recites, in part, a cheese substitute formed by blending bland edible particulate, *non-liquid* vegetable fat component, salt component and parmesan flavouring. Claim 17 recites, in part, a method for producing a cheese substitute comprising *softening but not liquefying* fully hydrogenated or partially hydrogenated vegetable fat and blending that *softened, non-liquid* vegetable fat component with bland edible particulate, a salt component and parmesan flavouring to a desired proportion until a crumbly product is formed by coagulation of the vegetable fat component with the other ingredients.

The examiner contends that Blackstock teaches the use of any suitable fat, including hydrogenated fats, for preparing a cheese substitute. Thus, as noted by the examiner (Office action, page 2), the present claims are distinguished from Blackstock in that the claims require a *non-liquid* vegetable fat, and in claim 17, a *softened, non-liquid* vegetable fat, wherein the softened vegetable fat is *not liquefied*. The examiner further states that the non-liquid limitation required by the claims would be inherent in and/or

obvious over Blackstock because the same components are used. However, as will be clear below, Blackstock teaches the use of a *liquefied* fat, and instructs one skilled in the art to heat and *liquefy* any fat being used, including a hydrogenated fat.

To begin, all of the Examples (i.e. I, II and III) of Blackstock teach that although hydrogenated fats can be used to prepare a food product, those fats are to be *liquefied* by heating to create a *liquid mixture*, which is then subsequently blended with the dry ingredients (which form a substrate carrier). For instance, Example I prepared a liquid mixture by heating in a steam jacketed kettle at about 140° F a blend of hydrogenated oils, low temperature (melting point) flavored vegetable fat, and other liquid ingredients (e.g., food coloring). See col. 4, lines 34-43. The resulting liquid was held at 120° F while being pumped into the dry mixture. See col. 4, lines 60-63. Similarly, Examples II and III each state that the tests were conducted in accordance with Example I, and thus liquid mixtures containing fats or oils were formed by heating in these Examples as well. In view of the Examples of Blackstock, one skilled in the art would only conclude that a fat and/or oil is to be liquefied by heating if being used to form a food product.

The remaining disclosure of Blackstock similarly suggests that any fat used should be liquefied. Blackstock describes the food particles as containing a substrate carrier having a *layer of fat* on the surface of the substrate and an exterior powder coating over the fat layer. See cols. 1 and 2, lines 70-72 and 1-5. The coating covers the surface of the “fat encapsulated” carrier particle. See col. 3, lines 30-45. Blackstock’s disclosure of an encapsulating fat layer clearly suggests that the fat is in a liquid state when it is blended with the dry ingredients, which is consistent with all of the Examples. Otherwise the fat would not form a coating over the substrate, but instead would simply be mixed together with it to produce a mixture of substrate particles with solid fat particles.

Moreover, the fact that Blackstock’s fat-encapsulated particles is provided with an exterior powder coating highlights a disadvantage of the prior art that is resolved by the claimed construction (and method). By keeping the fat in a softened yet still solid state while preparing the cheese substitute, a relatively dry final product of crumbly consistency is produced. Because of this, no powder coating as used in Blackstock is needed to prevent particles of the claimed composition from agglomerating (sticking together). When the fat component is in a non-liquid state upon preparation, the tackiness that produces agglomeration in Blackstock (but for the powder coating) is not

present in the claimed composition. Hence, no such powder coating is needed. This unique solution that avoids the need for a powder coating as in Blackstock is additional evidence of non-obviousness.

In contrast to the Examples in Blackstock, the examiner is relying solely on general disclosure that fat can be any suitable fat, such as vegetable fat or oils, hydrogenated or unhydrogenated, depending on the oil. But whatever the composition of the fat that is used in Blackstock, the fat is to be in a liquid state when combined with the solid mixture. Directly following the general disclosure of fats that may be used, Blackstock discloses that the melting point is preferably below 100°F, which clearly suggests a liquid. Blackstock briefly mentions that oils which are solid above this temperature can be used, but this statement is qualified in the description of the food product described directly following. See col. 2, lines 46-62.

Blackstock discloses that if the concentration of fat in the product exceeds 40 weight percent, the product becomes “wet” and “sloppy” and is unsuitable. A “wet” and “sloppy” product would result only if liquefied fats were used. If Blackstock used *non-liquid* fats (i.e. softened or solid) as claimed, the food product would not be described as “wet” and “sloppy.”

Prior to the Examples, Blackstock further describes a blending procedure for preparing the food products described therein. For example, Blackstock discloses that the dry ingredients (e.g., carrier, dry flavorings, salt, etc.) are blended with the liquid ingredients, wherein fat is specifically disclosed as a liquid. In this regard, Blackstock further discloses elevated temperatures, such as 120°-140° F (the same temperatures used in the Examples), are employed to bring the fat into the liquid state if it is not already in that state. See col. 3, lines 68-74. Once again, Blackstock clearly instructs one of ordinary skill in the art to liquefy fats before blending, which further emphasizes Blackstock’s focus on using liquefied fats.

In view of Blackstock’s description of the food products of the invention as the fat content varies (e.g., “wet” and “sloppy”), coupled with the fact that every Example therein teaches liquefying fats, along with the description of the blending procedure noted above, it is clear that Blackstock does not inherently teach the use of non-liquid vegetable fat. Moreover, it is apparent that not only is one skilled in the art specifically instructed to liquefy the fats, as clearly laid out in the Examples, but nothing in Blackstock

motivates that person to do otherwise. When Blackstock's general disclosure of hydrogenated fat/oil is considered as a whole and in context, one skilled in the art is instructed to liquefy fats to form a liquid mixture, rather than using the claimed "non-liquid" vegetable fat as recited in claims 1 and 17. Because the fats of Blackstock are rendered in the liquid state, Blackstock does not anticipate or render obvious the claimed "non-liquid" fat of claims 1 and 17. Accordingly, the anticipation and obviousness rejections of claims 1 and 17 based on Blackstock are overcome.

Lastly, the anticipation/obviousness rejections are further overcome by virtue of the differences of the claimed cheese substitute and method that require blending of a fat in a non-liquid state with a bland edible particulate, as compared to Blackstock. More specifically, the non-liquid fat and edible particulate components of the claimed invention act as a mixing matrix in which the parmesan flavouring is held. See published para. [0015] of the present application. Such a matrix bulks up the parmesan flavouring to approximate the consistency of real parmesan cheese. See para. [0016]. That is, as the non-liquid fat coalesces from a *softened* form, a crumbly mass is rendered that is reminiscent of dairy-produced parmesan cheese. See para. [0017]. By blending all of the claimed ingredients together in *non-liquid* form, the resultant product has a texture that feels creamier in the mouth, and a consistency similar to that of actual grated cheese.

In light of the foregoing, it is respectfully submitted that the present application is in a condition for allowance and notice to that effect is hereby requested. If it is determined that the application is not in a condition for allowance, Applicants request notification setting a date for filing an appeal brief. If there are any fees required by the present submission, please charge the same to our Deposit Account No. 16-0820, Order No. MORE-37106.

Respectfully submitted,

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